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October 10, 1994

Via Federal Express

Honorable Donna R. Searcy
Secretary
Federal Communications Commission
Washington, DC 20554

Re: In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act CC Docket No. 93-22

Dear Ms. Searcy:

Enclosed please find an original and four copies of Comments on behalf of The Association of Information Providers.

Although comments were due on October 10, 1994, as that was a federal holiday, we are submitting these comments for receipt by you on October 11, 1994.

Very truly yours,

Joel R. Dichter

Joel R. Dichter

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act	)	CC Docket No. 93-22
	)	
	)	

COMMENTS ON BEHALF OF THE
ASSOCIATION OF INFORMATION PROVIDERS

The Association of Information Providers ("AIP"), by its attorneys, Klein, Zelman, Briton, Rothermel & Dichter, submits the following comments with respect to the Commission's Notice of Proposed Rule Making.

I Presubscription or Comparable Arrangement

The Commission proposes to revise §64.1501(b)(5) to require that a presubscription or comparable arrangement "means a contractual arrangement, executed in writing, with a legally competent individual." The Commission tentatively has concluded that the proposed changes are necessary because the current rules did not meet the Commission's objective of preventing "instant" presubscription by "casual callers who had not received the basic information" to make informed choices, or who had not agreed to use the service on the terms offered. Finally, the Commission is concerned that by using the ANI for billing, there is insufficient guarantee that the person who enters into the presubscription arrangement is the subscriber to the originating line.

AIP believes that the current rules provide adequate protection to consumers. A two-call presubscription process, in which the caller first calls an 800 number, is provided with all required disclosure, and affirmatively agrees to use the service on those terms,[1] then is billed only for subsequent calls, and only after additional disclosure, affords sufficient protection against unknowingly entering into a presubscription arrangement.

As to the concern that the person entering into the presubscription arrangement may not be the subscriber to the originating line, this danger exists whenever someone other than the subscriber has access to the telephone. If an unauthorized person uses the telephone, the subscriber is responsible for the call, and there is no reason to apply a different rule only for information services.

For all practical purposes, the proposed changes will eliminate presubscription arrangements as a means of providing information services. In order to provide such services, not only would a written agreement be required, but carriers and IXC's would be required to have proof of such an agreement prior to billing for such services.[2] To require written agreements and

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[1] _I.e._, the caller (i) is advised of "*all material terms and conditions associated with the use of the service, including the service provider's name and address, a business telephone number which the consumer may use to obtain additional information or to register a complaint, and the rates for the service;*" *ii.* "*the service provider agrees to notify the consumer of any future rate changes*"; *iii.* "*the consumer agrees to utilize the service on the terms and conditions disclosed by the service provider*"; *and iv.* "*the service provider requires the use of an identification number or other means to prevent unauthorized access to the service by nonsubscribers.*"

[2] _See_ _Further Notice of Proposed Rule Making_, ¶29.

such proof with respect to each call billed is administratively impossible. Indeed, any rule that requiring proof to the carrier and IXC of a written agreement prior to billing each and every call would render presubscription arrangements infeasible.

Even if the Commission concludes that further regulation to deter unauthorized access is necessary, there are far less obtrusive means of doing so that will provide the protection the Commission desires without eliminating presubscription arrangements. For example, the Commission could require an initial telephone call containing all relevant disclosure. During this call, the consumer would be required to provide his or her name, address, home telephone number and date of birth. This call would be coupled with a return call to the consumer verifying the information provided in the initial call, verifying that the person entering into the presubscription arrangement is the subscriber, and providing the PIN number. Alternatively, following the initial call there could be a written notice containing required disclosure to the caller. This written communication could also be the means for assigning a PIN number, which would require an additional call by the consumer to activate. Moreover, the IP could be compelled to provide proof of the presubscription arrangement to the carrier or IXC whenever a caller questions a bill for such services.

Either method would require two sets of disclosure and also would require affirmative acceptance or confirmation that the caller intended to enter into a presubscription arrangement. Moreover, either method would preserve, at least to a limited extent, the viability of presubscription arrangements. When these methods are coupled with the liberal write-off policy, and maintenance of data bases by individual services to block repeat calls from ANI requesting blocking, adequate consumer protections are in place.

Finally, if the Commission is inalterably opposed to the use of 800 numbers for entering into a presubscription arrangement, we believe that the use of a free call to a 900 number for the initial presubscription sign-up call, and subsequent calls to an 800 number, should provide adequate protection. In this manner, households that block access to 900 numbers would not be eligible for non-written prescription arrangements.

II Termination of 800 Number Traffic

The Commission notes[3] that it has approved AT&T Tariff FCC No. 2, specifically Section 2.8.4, which "effective July 28, 1994, permits immediate termination rather than after 10 days notice" where an IP's programs are determined, in AT&T's judgment, not to be in compliance with TDDRA.

During the original rule making process, the Commission had proposed "prompt" termination after notice to an IP that its program was not being offered in compliance with the TDDRA. AIP and other IP's commented that immediate termination, without notice, on the basis of the carrier's sole judgment (or whim) ignored due process requirements. Relying on Friedman v.

[3]See Further Notice of Proposed Rule Making, p. 11, n. 32.

Maryland, 380 U.S. 51, 58 (1965), AIP argued that where a common carrier believed that a service provider was violating the regulations, the carrier should be required to, a) give 72 hours advance written notice of termination for an alleged violation; b) upon request by the service provider, be subject to judicial or other third party review by the Commission or some other neutral body; c) have the burden of proof that there has been a violation of federal law; and d) any such procedure must assure prompt judicial or third party review.

In response to such comments, the Commission amended §64.1503 to provide that

> [C]arriers acting under hat rule cannot terminate a pay-per-call program until at least seven and no more than 14 days after the IP has received written notice from a carrier citing the particular violation of law upon which a termination decision is based. An IP can avoid termination by responding with a corrective action during the notice period. In addition, IPs believing that a termination decision is unwarranted can seek to enjoin a carrier from executing that decision. The notice period will ensure a general level of consistency in termination procedures upon which IPs can rely without imposing unreasonable constraints on common carriers.

Report and Order Adopted July 15, 1994, at pp. 10-11.

Tariffs such as AT&T Tariff FCC No. 2, Section 2.8.4, which permit termination without notice, similarly run afoul of the constitutional due process requirements required under Friedman v. U.S. Such tariff provisions are inconsistent with the concerns recognized by the Commission with respect to §64.1503, and should not be approved by the Commission.

III **Tariffed 800 Collect Calls**

The Further Notice of Proposed Rule Making appears to be contradictory with respect to 800 collect calls provided pursuant to tariff. While the text of the Notice appears to acknowledge that such services are lawful, footnote 26 states

> Although we are retaining provisions governing collect calls by IPs, it does not appear to be economically viable for IPs to place collect calls to consumers. Such calls could be billed only at the tariffed rate, and the IP would not be compensated for the calls unless it were affiliated with the carrier or received a commission or other payment for sending the calls. This would appear to be both illegal and an effort by the carrier to evade the requirements of the TDDRA that information services be placed on the 900 service access code.

As to IP compensation for such calls, while it is unlawful to provide a rebate to a caller, there is nothing in the Communication Act to prevent a carrier from providing a commission to the IP from the tariffed rate for such services. Indeed, such a commission would be comparable to a carrier offering a commission for signing up subscribers for its long distance service. Clearly this practice is widespread and entirely lawful.

As to evading the "requirement" that information services be placed on the 900 service access code, as the Notice itself recognizes, services that do not fall within the statutory definition of pay-per-call services adopted by Congress need not be offered on the 900 service access code. (See Further Notice of Proposed Rule Making, ¶6, p. 4, "Section 64.1506 will be modified to clarify that services specifically exempted from pay-per-call status by Section 64.1501 need not be offered exclusively on the 900 service access code.") §64.1501(b) specifically excludes from the definition of pay-per-call services, "...any service the charge for which is tariffed...." Thus, tariffed services clearly need not be provided on the 900 service access code. Thus, tariffed collect call service does not fall within the definition of pay-per-call services, and need not be offered on the 900 service access code.

For these reasons, tariffed collect calls provided through the 800 service access code are entirely lawful and do not violate the TDDRA.

Dated: New York, New York
October 10, 1994

Respectfully submitted,

Association of
Information Providers

By: ______________________
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